

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ADOLFO MATURINO)	
Claimant)	
)	
V.)	
)	
EXIDE TECHNOLOGIES)	Docket Nos. 1,059,625
Respondent)	1,059,626
)	
AND)	
)	
AMERICAN ZURICH INSURANCE CO.)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

All parties requested review of the January 6, 2015, Award entered by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on May 12, 2015. Scott J. Mann of Hutchinson, Kansas, appeared for claimant. Dustin J. Denning of Salina, Kansas, appeared for respondent and its insurance carrier (respondent).

In Docket No. 1,059,625, the ALJ found claimant gave timely notice to respondent, but failed to sustain the burden of proving he sustained a personal injury to his low back on June 1, 2011.

In Docket No. 1,059,626, the ALJ found the June 17, 2011, hernia claim to be compensable. The ALJ awarded no permanent disability compensation, finding claimant presented no evidence of functional impairment as a result of the traumatic hernia. The ALJ awarded future medical treatment.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

According to his application to the Board, claimant requests review of the following issues related to Docket No. 1,059,625: personal injury by accident on June 1, 2011, and the nature and extent of his disability. In Docket No. 1,059,626, claimant requests review of whether he sustained an impairment of function as a result of his traumatic hernia.

Claimant's attorney did not submit a brief in support of their arguments on behalf of his client in this matter.

Respondent argues claimant offered no evidence he is in need of future medical treatment for Docket No. 1,059,626; therefore, future medical treatment in this claim should be closed. Respondent maintains the ALJ's Award should be affirmed in all other respects. In its brief, respondent conceded claimant provided timely notice in Docket No. 1,059,625.

The issues for the Board's review are:

Docket No. 1,059,625

1. Did claimant sustain personal injury by accident on June 1, 2011?
2. What is the nature and extent of claimant's disability?

Docket No. 1,059,626

1. Did claimant sustain an impairment of function as a result of his traumatic hernia?
2. Is claimant entitled to future medical treatment?

FINDINGS OF FACT

Docket No. 1,059,625

Claimant has worked for respondent since 1995. Claimant is currently a stacker, which requires claimant to push pallets loaded with battery plates, load the plates onto machines, and stack batteries. Claimant testified the batteries are heavy, and he essentially performs heavy lifting throughout a workday. Claimant's duties also include removing buckets of scrap, each weighing approximately 50 to 60 pounds. Claimant stated he moves the buckets on a daily basis.

Claimant testified he felt pain in his low back while lifting a bucket of scrap on June 1, 2011. Claimant stated he reported the incident to his lead, Jose Arias, about an hour later. Claimant testified he completed an injury report form and returned it to Mr. Arias.¹

¹ Claimant testified he completes any paperwork with the assistance of a co-worker because he is unable to write in English.

Claimant stated:

Q. When you filled out the report with Mr. Arias on June 1st [2011], did you see what he did with it?

A. In his office, there is a locker and a drawer locker, he placed it in there.

Q. Okay. Was there a discussion with him at that time about medical treatment for your back?

A. We didn't talk about that.²

Mr. Arias testified he had no recollection of claimant reporting an accident on June 1, 2011, receiving a report form from claimant, or putting a report form in the supervisor's office. Mr. Arias noted he did not expressly deny claimant's testimony. However, Mr. Arias stated he would follow standard procedure and refer the employee to the nurse's aide station, where a report form would be completed if an employee reported an injury.

Claimant continued working his regular duties until January 2012, when he asked Mr. Arias about the June 2011 report form. Mr. Arias denied any knowledge of a form from June 2011. Claimant then asked Cathy Carpenter, respondent's nurse, if she knew about his report form. Ms. Carpenter testified she was unaware of any problem with claimant's back until he asked about the report form. She said:

. . . [I]n January [2012] is when [claimant] had come in and was saying something about his back, and that was the first time I knew about it. He told me he filled the report out. I went and looked, we had no reports, went through all of the files, there was nothing. So I told him that he would need to get a report filled out, and that was the first that I was aware of a back injury.³

Claimant completed an Employee Report of Injury Form on January 18, 2012, reporting a back injury which occurred June 1, 2011. Greg Gordon, respondent's department supervisor, testified he first became aware of claimant's accident when he was asked to sign the report form on January 18, 2012. Mr. Gordon explained he was not in the office on June 1, 2011, and could not say what occurred on that date; however, he testified all leads and supervisors are trained in respondent's standard reporting procedure, and injury report forms are sent immediately to the nurse's station.

² P.H. Trans. at 20.

³ Carpenter Depo. at 5.

Claimant returned to the nurse's station on January 25, 2012, at which time Ms. Carpenter assured him the report of injury was filed. Ms. Carpenter testified she asked claimant if he required medical treatment at that time, and claimant declined. Claimant has had no treatment for his low back.

Dr. Paul Stein, a board certified neurosurgeon, examined claimant on June 7, 2012, at respondent's request. Claimant complained of low back pain with no radiation into either lower extremity. Claimant denied any low back problems prior to June 2011, and at that time Dr. Stein had no prior medical records to review. However, Dr. Stein examined claimant for an unrelated matter in 2010 and reviewed records from claimant's personal physician. Dr. Stein wrote:

When the patient was seen in this office on 6/8/10 he denied any prior history of back symptomatology. The records of Dr. Wedel reviewed at that time showed lower back complaints with extension into the right lower extremity in 2009. MRI scan of the lumbar spine at that time was reported as showing desiccation of the L5-S1 disk, questionable very small L4-L5 annular tear, and small central disk protrusion at L5-S1.⁴

Claimant admitted he received steroid injections in 2009, but testified the injections were for an area in his gluteus and not the same as his low back.

Dr. Stein performed a physical examination and could not say whether claimant sustained a low back injury. Dr. Stein noted further investigation was required and requested additional records for his review. He recommended claimant obtain an MRI and x-rays of the lumbar spine for comparison to those taken in 2009.

An MRI and x-rays of claimant's lumbar spine were taken in July 2012. In his supplemental report dated August 2, 2012, Dr. Stein wrote:

I have personally reviewed the images of the above studies. Flexion-extension x-rays show no evidence of instability. There is moderate desiccation of the L5-S1 disk. At L5-S1 there is mild central disk bulging without significant encroachment on the thecal sac or nerve roots. No clinically significant stenosis is present at any level. There may be slight bulging at L4-L5 without encroachment. Mild facet arthropathy at L4-L5.⁵

Dr. Stein testified he did not specifically detect any structural change to claimant's lumbar spine after comparison of the 2009 MRI and the 2012 MRI. Dr. Stein opined

⁴ Stein Depo., Ex. 2 at 4.

⁵ Stein Depo., Ex. 3 at 2.

claimant may have sustained some back strain/sprain at work on June 1, 2011, though it was difficult to document clearly. He wrote, "Therefore, assuming injury occurred on 6/1/11, [claimant] is at maximum medical improvement for that injury. The prevailing factor would be the strain/sprain of that date."⁶

Using the *AMA Guides*,⁷ Dr. Stein determined claimant sustained a 5 percent impairment to the body as a whole under DRE Lumbosacral Category II. Dr. Stein testified this category was appropriate due to claimant's history of a specific injury, some restriction of range of motion, and non-verifiable radicular complaints and spasm. Dr. Stein noted claimant did not require permanent work restrictions because there was no structural injury to the low back.

Dr. Michael Johnson, a board certified orthopedic surgeon, examined claimant at respondent's request on October 6, 2014. Claimant complained of pain and tenderness in his low back with no radicular pain, numbness or tingling. Dr. Johnson reviewed claimant's history, medical records, and performed a physical examination. Dr. Johnson testified:

The two diagnoses were, No. 1, lumbar strain; and No. 2, lumbar mild degenerative disk disease preexisting 2008 with L4-5 slight disk bulge and disk desiccation, which is – desiccation is just another word for degenerative changes.⁸

Dr. Johnson stated claimant's lumbar strain was caused by the accident on June 1, 2011. He did not provide an opinion regarding prevailing factor. Using the *AMA Guides*, Dr. Johnson opined claimant sustained a 5 percent impairment to the body as a whole under DRE Lumbosacral Category II.

Docket No. 1,059,626

On September 13, 2010, while working at respondent, claimant lifted a bucket full of scraps and felt a pull in the lower right side of his abdomen and was unable to function for over an hour. Claimant reported the incident and was referred to the nurse's station, where he completed a first aid report and was given ibuprofen. Claimant continued to work his regular job duties until June 14, 2011, when he sought medical care for abdominal discomfort.

⁶ *Id.*

⁷ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

⁸ Johnson Depo. at 12.

Claimant was referred to surgeon Dr. David Smith, who diagnosed claimant with an umbilical hernia. Dr. Smith ultimately performed surgery to repair the hernia on June 29, 2011. Claimant stated he eventually returned to work in his same position with no restrictions. However, claimant indicated he continued to have consistent pain in his right lower abdomen. Dr. Smith performed a diagnostic laparoscopy with division of adhesions on September 20, 2012. Claimant stated Dr. Smith said he did not find a new hernia in September 2012. On October 8, 2012, Dr. Smith released claimant to return to work with no restrictions after noting claimant's right lower quadrant discomfort appeared to be absent.

Dr. Johnson also reviewed claimant's history, medical records, and performed a physical examination related to claimant's abdomen on October 6, 2014. Claimant complained of tingling around his surgical incision site and pain in his right lower abdomen. Dr. Johnson noted claimant had well-healed surgical scars without signs of infection, and he stated some decreased sensation at an incision site is normal. He also indicated claimant had no erythema, no swelling, no evidence of a hernia recurrence and normal sensation involving the ilioinguinal and iliohypogastric nerves. Dr. Johnson opined claimant's hernia condition did not warrant a rating under the *AMA Guides*. He testified:

When I reviewed the AMA guidelines my understanding is that you could not rate just based on the fact that he had a hernia or hernia repair. You can make ratings based on sensory changes to a couple of nerves which can be affected, namely the – in this case the ilioinguinal or iliohypogastric can be used when you reference Table 24 on Page 152, but I felt he did not have signs that those nerves were affected, therefore, I gave him a zero percent rating based on the AMA guidelines for his hernia.⁹

Claimant testified he currently has pain in his right abdomen going into his right testicle that worsens with activity. He stated he has pain in his low back which at times extends into his right leg. Claimant continues to work for respondent as a stacker with no restrictions.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

⁹ *Id.* at 23.

K.S.A. 2011 Supp. 44-508(h) states:

“Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-508(f)(1) states:

“Personal injury” and “injury” mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

K.S.A. 2011 Supp. 44-508(d) states:

“Accident” means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. “Accident” shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 44-508(g) states:

“Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2011 Supp. 44-510d provides, in relevant part:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i, and amendments thereto. The injured employee may be entitled to payment of temporary total disability as defined in K.S.A. 44-510c, and amendments thereto, or temporary partial disability as defined in subsection (a)(1) of K.S.A. 44-510e, and amendments thereto, provided that the injured employee shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total or temporary partial disability as provided in the following schedule, 66⅔% of the average weekly wages to be computed as provided in K.S.A. 44-511, and amendments thereto, except that in no case shall

the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c, and amendments thereto.

(b) If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . .

(22) For traumatic hernia, compensation shall be limited to the compensation under K.S.A. 44-510h and 44-510i, and amendments thereto, compensation for temporary total disability during such period of time as such employee is actually unable to work on account of such hernia, and, in the event such hernia is inoperable, weekly compensation during 12 weeks, except that, in the event that such hernia is operable, the unreasonable refusal of the employee to submit to an operation for surgical repair of such hernia shall deprive such employee of any benefits under the workers compensation act.

(23) Loss of or loss of use of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

K.S.A. 2011 Supp. 44-510h(e) states:

It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

K.S.A. 2011 Supp. 44-525(a) states, in part:

No award shall include the right to future medical treatment, unless it is proved by the claimant that it is more probable than not that future medical treatment, as

defined in subsection (e) of K.S.A. 44-510h, and amendments thereto, will be required as a result of the work-related injury.

ANALYSIS

Docket No. 1,059,625

1. Did claimant suffer personal injury by accident on June 1, 2011?

The ALJ found claimant failed to sustain his burden of proving he suffered personal injury, in the form of a lesion or change in the physical structure of his back, as a result of the lifting incident of June 1, 2011. The ALJ also found claimant gave timely notice of the June 1, 2011, injury. In doing so, he found claimant's testimony more credible than the respondent's lack of recollection.

At the August 9, 2012, preliminary hearing claimant testified:

They installed new robots and these robots tend to make a lot of scraps, a lot of scraps in buckets, and the buckets, they fill up pretty fast, and once I noticed the bucket that was there was pretty full, I went to move it and move it away from there. It was about 60 pounds. Once I grabbed the bucket, I felt pain in the back. Felt pain (indicating).¹⁰

Respondent presented no evidence at the preliminary hearing to support a finding that the accident did not happen as described by claimant. At the regular hearing, claimant testified, "That day I bent forward to lift a bucket that was full of scraps off the floor, when I was lifting it I felt a pull in my back."¹¹ Respondent took the evidentiary depositions of four employees to prove they did not have notice of an accident. None of the witnesses contradicted claimant's testimony that an accident occurred on June 1, 2011.

Mr. Arias could not remember if claimant completed an accident report on the day of the accident.¹² Ms. Carpenter could not recall a conversation with claimant on June 1, 2012.¹³ Ms. Carpenter did not dispute the accident occurred. Mr. Cramer agreed that just because the accident report may have been misplaced did not mean something did not

¹⁰ P.H. Trans. at 17.

¹¹ R.H. Trans. at 15.

¹² See Arias Depo. at 17.

¹³ See Carpenter Depo. at 19.

happen to claimant on June 1, 2011.¹⁴ Mr. Gordon was on vacation when the accident occurred and was not in a position to refute claimant's testimony that an accident occurred on the date alleged.¹⁵

Dr. Stein diagnosed a lumbar strain related to the June 1, 2011, accident and assessed a 5 percent whole body impairment, assuming the accident occurred. Dr. Johnson also diagnosed lumbar strain and assessed a 5 percent whole body impairment related to the June 1, 2011, accident. The diagnosed lumbar strain and impairment resulting from claimant's work-related accident is evidence of a change in claimant's physical structure.

Based upon claimant's uncontradicted testimony that an accident occurred, and the medical evidence that claimant suffers an impairment related to the June 1, 2011, accident, the Board finds claimant met the burden of proving he suffered an injury by accident arising out of and in the course of his employment with respondent. There is no need for claimant to prove a change in the 2009 and 2012 MRI scans.

2. What is the nature and extent of claimant's disability?

Dr. Johnson testified claimant suffered a lumbar strain caused by his work-related accident and assessed a 5 percent impairment rating based upon the *AMA Guides*. Dr. Stein also assessed a 5 percent impairment related to claimant's June 1, 2011, work-related accident, assuming an injury occurred on the date alleged.

The Board finds claimant suffers a 5 percent whole body impairment related to his work-related injury by accident on June 1, 2011.

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1. Did claimant suffer an impairment of function as a result of his traumatic hernia?

The Board can find no evidence in the record supporting a finding of impairment related to claimant's hernia.

¹⁴ See Cramer Depo. at 12.

¹⁵ See Gordon Depo. at 9.

2. Is claimant entitled to future medical treatment?

The ALJ stated in his findings of fact "[t]here is no evidence in the record before the court that Claimant will require future medical treatment for either his low back or hernia claims."¹⁶ Yet in his conclusion, the ALJ wrote "[c]laimant is entitled to future medical, upon proper application, for the hernia claim."¹⁷ This was evidently written in error as there is, in fact, no evidence supporting the need for future medical treatment related to the hernia in the record. Future medical for the hernia is denied.

CONCLUSION**Docket No. 1,059,625**

Claimant met the burden of proving he suffered an injury by accident arising out of and in the course of his employment with respondent on June 1, 2011. Claimant suffers a 5 percent whole body impairment related to his work-related injury by accident.

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Claimant suffered no permanent impairment related to his work-related accident of June 17, 2011. Claimant is not entitled to future medical treatment for his work-related accident of June 17, 2011.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated January 6, 2015, is affirmed in part and reversed in part.

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Claimant is entitled to 20.75 weeks of permanent partial disability compensation at the rate of \$545.00 per week, or \$11,308.75, for a 5 percent functional disability, making a total award of \$11,308.75. As of June 15, 2015, there is due and owing to the claimant 20.75 weeks of permanent partial disability compensation at the rate of \$545.00 per week in the sum of \$11,308.75 for a total due and owing of \$11,308.75, which is ordered paid in one lump sum less amounts previously paid.

¹⁶ ALJ Award (Jan. 6, 2015) at 6.

¹⁷ *Id.* at 10.

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Claimant is not entitled to future medical treatment.

IT IS SO ORDERED.

Dated this _____ day of June, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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